

FILED

JAN 29 2008

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
MODESTO DIVISION

8	In re:)	Case No. 05-92908-D-7
9	JEFF STEWART,)	
10)	
11	Debtor.)	
12	LARRY GRAY, TRUSTEE,)	Adv. Pro. No. 07-9027-D
13)	
14	Plaintiff,)	Docket Control No. [moving
15	v.)	party did not designate a
16	THE INSURANCE CORPORATION OF NEW)	docket control number]
17	YORK aka INSCORP INSURANCE)	
18	CORPORATION OF NEW YORK,)	
19	Defendant.)	Hearing
20)	DATE: January 9, 2008
21)	TIME: 10:30 a.m.

MEMORANDUM DECISION

On October 12, 2007 Larry Gray, the chapter 7 trustee, filed a Complaint for Damages (the "Complaint") naming the Insurance Corporation of New York ("INSCORP") as a defendant. On December 26, 2007, INSCORP filed a motion to dismiss the Complaint. For the reasons set forth below, the court will deny the motion.

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1 defend and wrongly denied coverage; and (7) as a result of
2 INSCORP's breach of duty to defend and wrongful denial of
3 coverage the Debtor was damaged.

4 , On December 26, 2007 INSCORP filed a motion to dismiss the
5 Complaint (the "Motion to Dismiss"). The Motion to Dismiss
6 asserts the following: (1) the Trustee lacks standing, as the
7 Trustee is neither an insured nor a beneficiary under the INSCORP
8 Policy; and (2) Jeff Stewart Drywall, Inc. is already seeking
9 similar relief in another lawsuit pending in its chapter 7 case.

10 INSCORP's counsel has submitted a declaration in support of
11 the Motion to Dismiss (the "Declaration"), that purports to
12 authenticate the INSCORP Policy and have the INSCORP Policy
13 introduced into evidence. The Trustee has objected to the
14 Declaration and to the INSCORP Policy being admitted into
15 evidence. The Trustee's evidentiary objection is based, in part,
16 on the assertion that INSCORP's counsel has not demonstrated
17 personal knowledge sufficient to authenticate the INSCORP Policy,
18 and that the INSCORP Policy is missing several pages and is
19 facially incomplete.

20 II. CONTENTIONS OF THE PARTIES

21 The crux of INSCORP's argument is that Debtor is not an
22 insured or beneficiary under the INSCORP Policy, and as a result
23 the Trustee lacks both standing to bring the Complaint and has
24 failed to state a claim for relief. INSCORP relies on the
25 INSCORP Policy to support its position. Alternatively, INSCORP
26 argues it is entitled to dismissal of the Complaint because Jeff
27 Stewart Drywall, Inc. has a similar complaint pending in its own
28 chapter 7 case.

1 The Trustee responds by arguing the following: (1) that the
2 court should not consider material outside the Complaint, and the
3 Complaint alleges that "Jeff Stewart Drywall, Inc. and/or the
4 Debtor are named as insured under the policy, or, alternatively,
5 that Jeff Stewart is a party for whose benefit the INSCORP policy
6 was created in view of his status as an officer, director, and
7 sole shareholder of Jeff Stewart Drywall, Inc.;" (2) that at this
8 stage of the proceeding the Trustee's allegations must be taken
9 to be true, and accordingly the Motion to Dismiss must be denied;
10 (3) that as to the cause of action for good faith and fair
11 dealing, it is enforceable by anyone within the class of insureds
12 under the INSCORP Policy; (4) the fact that Jeff Stewart Drywall,
13 Inc. may have a separate lawsuit pending dealing with the INSCORP
14 Policy is not a basis for having the Complaint dismissed; and (5)
15 that even if the court were inclined to consider material outside
16 the Complaint, such as the INSCORP Policy, the policy has not
17 been properly authenticated, is incomplete and should not be
18 admitted into evidence.

19 20 III. ANALYSIS

21 This court has jurisdiction over the Motion pursuant to 28
22 U.S.C. §§ 1334 and 157(b)(1). The Motion is a core proceeding
23 under 28 U.S.C. § 157(b)(2)(I).

24 A. Standards for Dismissal under Fed. R. Civ. P. 12(b)(6)

25 The United States Supreme Court has recently adopted a
26 "plausibility" standard for assessing Rule 12(b)(6) motions,
27 analyzing the complaint before it in terms of whether it
28 contained enough factual allegations, taken as true, to plausibly

1 suggest that the plaintiff was entitled to relief. Bell Atl.
2 Corp. v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 945
3 (2007). "[W]e do not require heightened fact pleading of
4 specifics, but only enough facts to state a claim to relief that
5 is plausible on its face." 127 S. Ct. at 1974.

6 On a motion to dismiss, generally the court should not
7 consider material outside the complaint (e.g., facts presented in
8 briefs, affidavits, or discovery materials.) [California Practice
9 Guide: Federal Civil Procedure Before Trial, 9:211 at 9-60,
10 citing Arpin v. Santa Clara Valley Transp. Agency (9th Cir.
11 2001), 261 F.3d 912, 925].

12 Instead, the complaint must be construed in the light most
13 favorable to the Plaintiff, accepting as true all material
14 allegations, as well as reasonable inferences to be drawn from
15 them [Conley v. Gibson (1957) 355 U.S. 41, 45-46; Pareto v.
16 F.D.I.C. (9th Cir. 1998) 139 F.3d 696, 699]. Thus, no matter how
17 improbable the facts alleged are, they must be accepted as true
18 for purposes of the motion. [Neitzke v. Williams (1989) 490 U.S.
19 319, 328-329, Cited in Federal Civil Procedure Before Trial,
20 9:216 at 9-66].

21 As a preliminary matter, the court sustains the Trustee's
22 evidentiary objection to the Declaration. Specifically, the
23 court finds that the Declaration does not sufficiently
24 demonstrate the declarant's personal knowledge of the INSCORP
25 Policy to authenticate same. INSCORP's counsel is not a party to
26 the INSCORP Policy, nor has she demonstrated personal knowledge
27 of the document. As a separate basis for sustaining the

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1 Trustee's evidentiary objection, the court finds the INSCORP
2 Policy attached to the Declaration is facially incomplete.

3 As to the Motion to Dismiss, the problem with INSCORP's
4 argument is that it requires the court to look outside of the
5 Complaint. The Complaint alleges that "Jeff Stewart is a named
6 insured under the INSCORP Policy, and/or a party for whose
7 benefit the INSCORP Policy was created in view of his status as
8 an officer, director and sole shareholder of Jeff Stewart
9 Drywall, Inc." [Complaint at § 11] The Complaint must be
10 construed in the light most favorable to plaintiff accepting
11 material allegations as true. Accordingly, the court finds the
12 Complaint contains sufficient factual allegations, taken as true,
13 to plausibly suggest that the Trustee is entitled to relief.
14 Bell Atl. Corp vs. Twombly, supra.

15 The court recognizes that under limited circumstances it can
16 look outside a complaint and consider a document that is central
17 to a complaint. However, in the case at hand even if the court
18 were inclined to consider the INSCORP Policy, the court has
19 sustained the Trustee's evidentiary objection and the INSCORP
20 Policy has not been admitted into evidence. Thus, the INSCORP
21 Policy is not part of the court record. The court is left only
22 with the allegations contained in the Complaint, which on their
23 face withstand the Motion to Dismiss.

24 As to INSCORP's argument that Jeff Steward Drywall, Inc. has
25 a similar action pending in its bankruptcy case, that is not a
26 basis for dismissal of the Complaint.

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1 IV. CONCLUSION

2 The court finds that when construing the Complaint in the
3 light most favorable to the Trustee and accepting as true all
4 material allegations, that the Complaint states a claim upon
5 which relief can be granted.

6 For the reasons set forth above the court will issue an
7 order denying the Motion to Dismiss and set a deadline for the
8 filing of an answer or other responsive pleading.

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10 Dated: JAN 29 2008


11 ROBERT S. BARDWIL
12 United States Bankruptcy Judge
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Certificate of Service

I certify that on JAN 29 2008 a copy of the foregoing document was mailed to the following:

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FOR THE COURT
RICHARD G. HELTZEL
CLERK, U.S. BANKRUPTCY COURT

By: 
Deputy Clerk